Supreme Court, U.S.
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No. 83-2101 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD A. DANIEL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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Petitioner seeks review of the decision of the court of appeals holding that 5 U.S.C. 8347(c)[1] precludes judicial review of the decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his application for civil service disability retirement benefits. The question whether the court of appeals may review the denial of employee-initiated applications for disability benefits based on

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[1]5 U.S.C. 8347(c) provides:

> The Office [of Personnel Management] shall determine questions of disability * * * arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review.

Section 8347(d), as pertinent here, provides for review of OPM decisions only by the MSPB. 5 U.S.C. 8347(d)(1).

physical disability is before the Court in *Lindahl* v. *OPM*, cert. granted, No. 83-5954 (June 18, 1984). As petitioner recognizes (Pet. 6, 16), the court of appeals' decision in this case was based upon its prior decision in *Lindahl*, as applied in the court's intervening decision in *Henderson* v. *OPM*, 724 F.2d 119 (Fed. Cir. 1983). See Pet. App. A2.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and then disposed of in light of the Court's decision in *Lindahl* v. *OPM*, No. 83-5954.

REX E. LEE
Solicitor General

JULY 1984

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[2]Petitions for a writ of certiorari also are pending in three other cases that were disposed of by the Federal Circuit based upon its decision in *Lindahl*. See *Swanson* v. *MSPB*, petition for cert. pending, No. 83-6034; *Gates* v. *MSPB*, petition for cert. pending, No. 83-6093; *Smith* v. *OPM*, petition for cert. pending, No. 83-6440.

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